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No. OFFICE OF THE CLERK

# IN THE
# *SUPREME COURT OF THE UNITED STATES*

MELVIN ALAN WOOD,

Petitioner,

v.

MICHAEL KESLER,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

# PETITION FOR A WRIT OF CERTIORARI

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15 pp

## QUESTIONS PRESENTED

1. In *Johnson v. Jones*, 515 U.S. 304 (1995) this Court established that governmental officials - entitled to assert a qualified immunity defense in a civil tort action - cannot seek immediate appeal of a district court order denying a motion for summary judgment when there are questions involving a fact-related dispute. The Eleventh Circuit opinion held in this case that the appellate court could engage in resolving fact-related disputes to determine whether there was a genuine issue of fact for trial through an interlocutory appeal.

The question presented is whether the Eleventh Circuit decision to review and reverse a district court order denying a qualified immunity defense through an interlocutory appeal conflicts with the Court's decision in *Johnson v. Jones*, 515 U.S. 304 (1995).

## TABLE OF CONTENTS

Questions Presented ..... i

Table of Contents ..... iii

Table of Cited Authorities ..... iv

Table of Appendices ..... v

Petition for A Writ of Certiorari ..... 1

Opinions Below ..... 1

Statement of Jurisdiction ..... 1

Statement of the Case ..... 1

Course of Proceedings ..... 1

Statement of the Facts ..... 2

Reasons For Granting The Writ ..... 4

Conclusion ..... 11

Appendix A - Opinion of the United States Court of Appeals for the Eleventh Circuit Dated and Decided March 4, 2003 ..... 1A

Appendix B - Opinion and Order of the United States District Court for the Northern District of Alabama Dated and Filed September 19, 2001 ..... 21A

Appendix C - Opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing and en banc consideration Dated and Decided April 28, 2003 ..... 59A

## TABLE OF CITED AUTHORITIES

CASES Page

*Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996) 74 F.3d 1087 (11th Cir. 1996) ..... 5

*Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996) ..... 5

*Johnson v. Jones*, 515 U.S. 304 (1995) ..... 5, 6, 11

*Koch v. Rugg*, 221 F.3d 1283 (11th Cir. 2000) ..... 5

STATUTES Page

Section 32-5a-190(a) of the Code of Alabama (1975) ..... 8

## TABLE OF APPENDICES

Appendix A - Opinion of the United States Court of Appeals for the Eleventh Circuit Dated and Decided March 4, 2003 ..... 1A

Appendix B - Opinion and Order of the United States District Court for the Northern District of Alabama Dated and Filed September 19, 2001 ..... 21A

Appendix C - Opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing and en banc consideration Dated and Decided April 28, 2003 ..... 59A

## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The district court's opinion (per Blackburn, J.) denying respondent's summary judgment motion (Appendix ("Pet. App.") 21A) is not published. The court of appeals' opinion (per Carnes, J., joined by Hull and Alarcon, JJ.) reversing the district court and granting respondent's summary is published at 206 F.3d 161 (Pet. App. 1A). The court of appeals' order denying rehearing and rehearing *en banc* (Pet. App. 59A) are not otherwise published.

## STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on March 4, 2003, and denied rehearing and rehearing en banc on April 28, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1254(1).

## STATEMENT OF THE CASE

### COURSE OF PROCEEDINGS

Petitioner filed a multi-count civil rights case against Respondent, an Alabama State Trooper. The action was based upon Petitioner being charged and arrested for reckless driving on the day set for trial for an earlier

speeding and log book violation tickets issued to Petitioner by Respondent. Petitioner's theory of his case was that his arrest for the charge of reckless driving was in retaliation for his refusing to accept a plea bargain on his speeding and log book cases and for subpoenaing Respondent's ticket book. Petitioner's arrest took place when he appeared in court for trial on the speeding and log book cases.

At the conclusion of discovery Respondent filed a motion for summary judgment which included claims for qualified immunity as to the federal claims and discretionary function immunity as to State law claims. Petitioner opposed this summary judgment effort with numerous factual submissions. These factual submissions indicated that there were genuine issues of material fact present with respect to the qualified immunity and discretionary immunity defenses in this case.

The district court denied Respondent's summary judgment on September 19, 2001 as to both the Federal and State law claims concluding that there were genuine issues of material fact present necessitating submission to a jury.

Jurisdiction before the United States District Court was based upon 28 U.S.C. Section 1331 and 42 U.S.C. Section 1983. Respondent sought appellate review before the Eleventh Circuit Court of Appeals under 28 U.S.C. Section 1291 and the collateral order doctrine.

## STATEMENT OF FACTS

On March 30, 1998, Petitioner was driving a mobile home hauler, which is a commercial vehicle designed to pull a mobile home, on an Interstate in Alabama. Bob

Payne, a former Sheriff of Tishmingo County, Mississippi, was traveling with Petitioner. David Martin was driving another mobile home hauler behind Petitioner. Both Petitioner and Martin were traveling from Red Bay, Alabama to Nashville, Tennessee to pick up mobile homes for transport.

Respondent was on duty checking northbound traffic on Interstate I-65 north of Athens, Alabama. At this area of the interstate there was construction and the highway was reduced to a single lane of traffic. There were marked barrels on the interstate between the left lane and the right lane of the northbound traffic. Respondent was parked in the right lane, which was closed to traffic, with his vehicle facing directly south. The normal speed limit for that area was seventy miles per house, but due to the construction, the speed limit had been reduced to forty-five miles per hour. Respondent stopped both Petitioner and Martin, and cited both for speeding and failing to have a log book. Martin testified that neither vehicle was speeding. In the initial report of the incident, Respondent stated:

> This particular morning these two vehicles were traveling North well about the posted limit when they reached this point. The driver of the first truck, once realizing I was there, quickly decelerated momentarily loosing [sic] traction, to just above the speed limit. My clock on him, with a tracking history, was 62 mph. The second truck, running faster than the first, also slammed on his brakes, causing his truck to slide sideways. He barely kept control of it and on the roadway went by at 64 mph with a tracking history.

Respondent testified at his deposition that upon realizing that he was monitoring traffic, Petitioner quickly decelerated to just about the speed limit and lost traction for maybe a second.

The citations issued by Respondent on March 30, 1998, set the initial court appearance for May 4, 1998. Petitioner appeared pro se at the Limestone County Courthouse on May 4, 1998 and pled not guilty to the offenses for which he had been cited and requested a trial date. Trial was set for July 8, 1998. On June 26, 1998 Petitioner requested a subpoena for Respondent's ticket book. Upon receiving the subpoena, Respondent failed to provide the requested documents or respond to the subpoena in any way.

Martin, the second truck driver, entered into a plea agreement with the district attorney on July 8, 1998, the date of trial. Martin's plea agreement included a $20.00 fine plus court costs for the log book violation and dismissal of the speeding violation upon payment of court costs and the successful completion of driving school. Petitioner refused the district attorney's offer of a plea bargain, which included a $380.00 file for the log book violation and dismissal of the speeding violation upon payment of the court costs and successful completion of driving school. When Petitioner refused the plea bargain, Respondent issued Petitioner a new citation for reckless driving.

Respondent issued the citation for reckless driving inside the Limestone County Courthouse over three months after he stopped Petitioner for speeding. Petitioner refused to sign the ticket for reckless driving instead directly complaining to the district court judge over its issuance on the date of trial. Respondent then arrested Petitioner for the

reckless driving offense and took him to the LImestone County Jail. On the way to the jail, Respondent questioned Petitioner as to why he had not taken the plea agreement and why plaintiff had requested his ticket book. Petitioner was held in jail approximately four or five hours before being released. Due to his arrest, trial on the speeding and log book citations was not held on July 8, 1998.

At the subsequent trial for all of the charges held on September 2, 1998, Petitioner was found not guilty of reckless driving and guilty of speeding. The district court judge assessed a nominal fine for the speeding conviction.

## REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision conflicts with the clear mandate concerning interlocutory appeals involving qualified immunity set forth in *Johnson v. Jones*, 515 U.S. 304 (1995). The Eleventh Circuit decision reflects a continuing erosion of extent of interlocutory appeals such that they are now becoming the rule, not the exception. *Koch v. Rugg*, 221 F.3d 1283 (11th Cir. 2000); *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996); 74 F.3d 1087 (11th Cir. 1996); *Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996). The prospects of a full plenary review of the denial of qualified immunity in summary judgment proceedings is fast becoming an accepted step in a defense strategy to extend the pre-trial proceedings and thwart civil trials.

In *Johnson*, the Court clearly intended to limit the scope of an interlocutory appeal taken by a governmental official to contest the denial of qualified immunity. Justice Breyer, delivering the opinion for the Court, noted the extremely narrow basis for an interlocutory appeal:

> We now consider the appealability of a portion of a district court's summary judgment order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency," i.e., which facts a party my, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. That is, the District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioner's involvement in the alleged beating of respondent was not a "final decision" within the meaning of the relevant statute.

*Id.* at 313. Applied to this proceeding, the District Court determination that the summary judgment record in the case raised a genuine issue of fact concerning Respondent's belated charge of reckless driving against Petitioner was not a "final decision" which permitted appellate review by the Eleventh Circuit.

The Eleventh Circuit decision crossed this threshold by making determinations as to the sufficiency of the evidence which were contrary to those made by the District Court in denying the qualified immunity defense at the summary judgment proceeding stage. The Eleventh Circuit decision weighed the sufficiency of the evidence when it concluded that Respondent had arguable probably cause to charge and arrest Petitioner for reckless driving some three (3) months after the alleged offense took place and only after Petitioner failed to accept a plea bargain involving the original charges of speeding and log book violations. The Eleventh Circuit decision evaluated evidence sufficiency in reaching its conclusion - a clear deviation from the interlocutory appeal limitation placed by *Johnson*.

The Eleventh Circuit opinion ignores the fact that Petitioner was specifically found not guilty of reckless driving and that, as the District court found during summary judgment proceedings, there were genuine issues of material fact present as to the issue of arguable probable cause. (Pet. App. 42A) It is easily apparent that the Eleventh Circuit decision engaged in evaluating evidence sufficiently when it concluded that Respondent "had actual probable cause to issue the reckless driving citation and to arrest Petitioner." (Pet. App. 8A). The reach this conclusion the Eleventh Circuit had to engage in evaluating the evidence on interlocutory appeal.

Evidence sufficiency was at the heart of the Eleventh Circuit's conclusion that Petitioner was driving 17 mph over the speed limit based solely upon the conviction for speeding. The Eleventh Circuit decision attempts to bootstrap a specific charge of "speeding" and a State district court finding of "guilty" into a factual, final and determinative matter that the Petitioner was traveling 17 mph over the speed limit.[1]

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[1] Respondent testified that he was using a radar unit to track the speed of vehicles he was checking. There was no documentary evidence produced by the radar unit to corroborate Respondent's momentary observation of the radar unit before the unit locked on the second vehicle behind Petitioner. The District Court specifically found that Respondent's credibility was at issue in this case noting "[Respondent] asserts that after both trucks passed him, he turned around and pulled behind Martin's truck. However, other witnesses have contradicted [Respondent], noting that he pulled out between the two trucks and almost collided with Martin's vehicle. [Petitioner] asserts that this discrepancy puts [Respondent's] credibility at issue." (Pet. App. 23A)

In addition to Petitioner specifically denying that he was traveling over the speed limit the factual record controverted the claimed 17 mph over the speed limit charge. The District Court in denying qualified immunity in summary judgment proceedings detailed the controverted factual record demonstrating the genuine issues of act present in the case. Judge Blackburn noted:

> [Petitioner] claims that summary judgment is appropriate in this case because the facts relating to whether probable clause existed to support the charge of reckless driving are in dispute. To support this assertion, [Petitioner] points out that (1) Witness Payne, a former sheriff for Tishmingo County, Mississippi who was a passenger in [Petitioner's] vehicle, has offered testimony that [Petitioner} did not "lock his brakes, swerve, or loose [sic] control of the truck;" (2) Payne further noted that "[n]othing that [Petitioner] did in operating the truck cab in which I was a passenger amounted to reckless driving;" (3) "Martin.. stated that neither his truck or [Petitioner's] was going faster than 45-50 mph when they entered the construction area;" (4) Martin also "noted [that] [Petitioner} did not lock the wheels on his truck or do anything that caused him to lose control of his vehicle;" (5) [Petitioner] has also denied any driving conduct which would constitute reckless driving; (6) [Respondent's] version of the facts supplied in his summary judgment brief point to a lack of probable cause...[Respondent] has offered in [his] brief [that] [Petitioner] "quickly decelerated, momentarily losing traction to just about the speed limit. [Petitioner] lost traction for maybe a second;" and (7) [Respondent] admitted that he was not

> surprised in the not guilty verdict when the reckless driving ticket was tried. Further, [Petitioner] notes that [Respondent] did not issue the citation until three months after the initial stop when [Petitioner] refused to accept the plea agreement, and Martin, who was following [Petitioner], and who, according to [Respondent's] testimony, was driving more egregiously, was not issued a ticket for reckless driving.

(Pet. App. 39A - 40A).

Evening assuming that the Eleventh Circuit is permitted to engage in the weighing of evidence and to become a fact finder in an interlocutory appeal, a finding that Petitioner was traveling 17 mph over the posted speed limit is not sufficient to support a charge of reckless driving. Reckless driving, the charge for which Petitioner was found not guilty, is defined in Section 32-5a-190(a) of the Code of Alabama (1975) as follows:

> Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard for the rights or safety of persons or property, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.

The Eleventh Circuit decision in its fact finding failed to embrace the statutory requirement that there must be conduct "as to endanger or be likely to endanger any person or property." Instead, the Eleventh Circuit decision abruptly discards such proof and holds that an alleged judicial finding of 62 mph in a 45 mph zone - which was

totally controverted in the factual record - is sufficient to establish arguable probable cause.

In reaching this fact finding, the Eleventh Circuit decision ignored the factual record which included the following admissions by Respondent:

Q. How long in your judgment did [Petitioner] lose traction?
A. Maybe a second.

Q. And, to your knowledge, were there any skid marks?
A. No, sir, there were not.

Q. Was there any smoke from his tires?
A. No, sir, there was not.

Q. Did he ever leave his lane of traffic?
A. No, sir, he did not.

Q. And as best I can tell, as I went through the sequence with you, you don't remember his coming up on some vehicle in front of him?
A. Correct

Q. Did he in any way threaten or endanger a vehicle immediately in from of him in his lane of traffic?
A. No, Sir. In that one particular lane, no, sir.

Q. And did he hit or come into contact with any barrels?
A. No, Sir.

Q. Did he come in contact with your vehicle?
A. No, sir.

Q. Did he come close to any worker?
A. Not that I saw, no, sir.

The District Court order in this case denying the qualified immunity defense in summary judgment proceedings is the kind of issue that trial judges, not appellate judges, regularly confront. *See Johnson* at 315. Appellate judges, as evidenced by the flawed analysis and opinion in this case, have no comparable expertise in this area.

The Eleventh Circuit ran roughshod over this Court's holding in *Johnson* and the expected limitation on what matters are permissible in an interlocutory appeal dealing with qualified immunity. The explosion of such interlocutory appeals which have become a staple of the defense strategy to draw out the civil litigation further points to the need for review by this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A - Opinion of the United States Court of Appeals for the Eleventh Circuit Dated and Decided March 4, 2003

Appeal from the United States District Court for the Northern District of Alabama (March 4, 2003)

Before CARNES, HULL and ALARCON*, Circuit Judges.

HULL, Circuit Judge:

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*Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Defendant Michael Kesler, a state trooper, appeals the denial of immunity on plaintiff's Section 1983 claims and state law claims. We reverse because defendant Kesler was entitled to qualified immunity on the Section 1983 claims and discretionary function immunity on the state law claims.

## I. FACTUAL BACKGROUND

A. Traffic Stop

On March 30, 1998, plaintiff Melvin Alan Wood ("Wood") was driving a large tractor truck called a "mobile home hauler." Instead of a mobile home, Wood was carrying a pickup truck "piggyback," and the pickup truck was completely off the ground. Wood's passenger was Bob

Payne. Traveling behind Wood, David Martin was driving another "mobile home hauler," also without a mobile home.

Both Wood and Martin were driving their tractor trucks northbound on I-65 in Alabama to pick up mobile homes for transport in Nashville, Tennessee. Kesler, a state trooper in Alabama, was monitoring northbound traffic on I-65 north of Athens, Alabama. This stretch of interstate highway was under construction and had been reduced to a single lane of traffic on the northbound side. Only the left lane of the northbound interstate was open. Marker barrels were positioned between the left lane and the closed right lane of the northbound interstate. Trooper Kesler was parked in the closed right lane with his vehicle at the bottom of a hill and facing the oncoming northbound traffic. Because of the construction and barrels, the normal speed limit of 70 mph was reduced to 45 mph for the single open lane of the northbound side.

Trooper Kesler stopped both Wood and Martin for speeding. They each produced a driver's license, log book, and medical card. Kesler cited Wood and Martin for speeding and not having updated log books. The citation for Wood charged him with speeding at 62 mph in a 45 mph zone. Trooper Kesler advised both drivers to update their log books at the nearest truck stop.

In his deposition, plaintiff Wood denies that he was speeding. Wood testified that he was traveling "around the 45 zone, maybe less, because I had been through that zone. And I knew that the troopers had been working it strongly." Upon seeing Trooper Kesler's blue lights flashing, Wood "didn't hit [his] brakes or anything," but just "went on down

the hill and pulled off."[1] According to Wood, Kesler never informed him that his conduct constituted reckless driving.[2]

Further, Wood's passenger Payne testified that Wood did not lock his brakes, swerve or lose control of his truck. Martin, driving behind Wood, testified that Wood slowed his vehicle to approximately 45 to 50 mph.

B. Reckless Driving Citation

Trooper Kesler's traffic citations set plaintiff Wood's initial court appearance for May 4, 1998. Wood appeared in court, pled not guilty and requested a trial date, which was set for July 8, 1998. Later, Wood, pro se, filed a document request for Kesler's records. On the advice of his superiors and the district attorney's office, Kesler did not provide the documents or respond.

At trial on July 8, 1998, plaintiff Wood refused to accept a plea bargain and decided to defend against the charges.[3] At that time, Assistant District Attorney Brian Jones spoke with both plaintiff Wood and Trooper Kesler about the

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[1] We recount the facts in the light most favorable to Wood, the non-moving party, on a motion for summary judgment. Lee v. Ferraro, 284 F.3d 1188, 1190 (11th Cir. 2002); Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1277 (11th Cir. 1998). For that reason, what we set out in this opinion as "the facts" for summary judgment purposes may not be the actual facts. See Swint v. City of Wadley, 51 F.3d 988, 992 (11th Cir. 1995).

[2] Kesler contends that he advised both drivers that their conduct constituted reckless driving, but that in his discretion he would not issue citations for that offense.

[3] Martin entered into a plea agreement with prosecutor Jones on July 8, 1998.

circumstances surrounding the speeding and log book citations. Kesler advised prosecutor Jones that Wood had lost control of his vehicle due to Wood's locking his brakes, but that Kesler had decided not to issue a reckless driving citation to Wood. After speaking with Trooper Kesler, prosecutor Jones instructed Kesler to issue Wood a citation for violation of the reckless driving statute.[4]

Trooper Kesler complied with Jones's instruction, back-dating the reckless driving citation to March 30, 1998, the date of the speeding charge.[5] Kesler also obtained an arrest warrant on the reckless driving charge. Kesler did not believe that he could refuse when prosecutor Jones told him to write the reckless driving citation. Kesler felt that Jones was his superior.

C. Wood's Arrest

Wood refused to sign the reckless driving citation, despite being informed that it was not an admission of guilt and that refusing to sign it would result in his being arrested and taken to jail. Trooper Kesler then arrested Wood and took him to the county jail. The full custodial arrest was based on Wood's refusal to sign the citation. On the way to the jail, Kesler asked Wood why he had not taken the plea

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[4] The record is unclear about the number of times that prosecutor Jones spoke with Wood and Kesler and in which order. Wood originally filed his complaint against Trooper Kesler only, but he amended it to add Assistant District Attorney Brian Jones as a defendant. The district court dismissed defendant Jones from the case, and Jones is not a party to this appeal.

[5] Wood's complaint alleges that Kesler made false written statements on the reckless driving citation; however, he does not indicate which statements were false.

agreement and why he had requested Kesler's records. Wood spent four to five hours at the jail before being released.

At a subsequent trial on the charges, the court found Wood guilty as charged of speeding 62 mph in a 45 mph zone and not guilty of reckless driving,[6]

## II. PROCEDURAL HISTORY

Wood filed this action against Trooper Kesler in his individual and official capacities alleging civil rights violations under 42 U.S.C. Section 1983, a civil rights conspiracy under 42 U.S.C. Section 1985, and false arrest and malicious prosecution under Alabama law.

Following discovery, defendant Kesler moved for summary judgment. The district court granted summary judgment in Kesler's favor on all claims against him in his official capacity and on Wood's Section 1985 claim against him individually. The district court, however, denied summary judgment to Kesler individually on Wood's Section 1983 claims and state law claims. Kesler timely appealed seeking immunity on all remaining claims.[7]

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[6] The front of the speeding citation expressly charges that Wood was traveling "62 mph" in a "45 mph Speed Limit." The back of the speeding citation is signed by the magistrate judge, and states that the magistrate judge found Wood "Guilty as charged."

[7] The denial of summary judgment based on absolute and qualified immunity is immediately appealable, Mitchell v. Forsyth, 472 U.S. 511, 530 (1985), and so is the denial of Alabama's discretionary-function immunity, Sheth v. Webster, 145 F.3d 1231, 1238 (11th Cir. 1998). See also Taylor v. Adams, 221 F.3d 1254, 1260 n.9 (11th Cir. 2000) (stating that "the same principles of federal law governing an appeal of the denial of qualified immunity at the summary judgment

## III. QUALIFIED IMMUNITY ON SECTION 1983 CLAIMS

We first address whether Trooper Kesler is entitled to qualified immunity on plaintiff Wood's Section 1983 claims for false arrest, malicious prosecution, and retaliation.[8] Wood asserts that Kesler lacked probable cause to charge him with reckless driving and to arrest him. Wood contends that Kesler did so maliciously and in retaliation for Wood's exercising his rights to trial and to subpoena records.

### A. General Principles

"Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation marks and citations omitted).

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stage also govern an appeal of the denial of Alabama discretionary function immunity at the same stage"); Nolin v. Isbell, 207 F.3d 1253, 1255 n.1 (11th Cir. 2000).

[8] We review de novo the denial of summary judgment;, construing the facts in the light most favorable to the non-moving party. Lee v. Ferraro, 284 F.3d 1188,1190 (11th Cir. 2002); Jones v. Cannon, 174 F.3d 1271,1281(11th Cir. 1999).

To receive qualified immunity, "the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." Id. (internal quotation marks omitted). Here, it is clear that Trooper Kesler was acting within the course and scope of his discretionary authority when he charged and arrested Wood. "Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." Id.

The Supreme Court has set forth a two-part test for the qualified immunity analysis. "The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 2513, 153 L. Ed. 2d 666 (2002) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Saucier, 533 U.S. at 201. However, "[i]f a constitutional right would have been violated under the plaintiff's version of the facts, 'the next, sequential step is to ask whether the right was clearly established.'" Vinyard, 311 F.3d at 1346 (quoting Saucier, 533 U.S. at 201). Thus, we now analyze whether Trooper Kesler's conduct violated Wood's constitutional rights.

B. False Arrest

An arrest does not violate the Fourth Amendment if a police officer has probable cause for the arrest. See Lee, 284 F.3d at 1194-95; Ortega v. Christian, 85 F.3d 1521, 1525 (11th Cir. 1996); Von Stein v. Brescher, 904 F.2d

572, 578 (11th Cir. 1990). "For probable cause to exist, ... an arrest must be objectively reasonable based on the totality of the circumstances." Lee, 284 F.3d at 1195. "This standard is met when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Rankin v. Evans, 133 F.3d 1425, 1435 (11th Cir. 1998) (internal quotation marks omitted). "Although probable cause requires more than suspicion, it does not require convincing proof, and need not reach the [same] standard of conclusiveness and probability as the facts necessary to support a conviction." Lee, 284 F.3d at 1195 (internal quotation marks and citations omitted) (alteration in original).

To receive qualified immunity protection, "an officer need not have actual probable cause but only 'arguable probable cause.'" Montoute v. Carr, 114 F.3d 181, 184 (11th Cir. 1997). Because only arguable probable cause is needed, "the inquiry is not whether probable cause actually existed, but instead whether an officer reasonably could have believed that probable cause existed, in light of the information the officer possessed." Id. "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." Hunter v. Bryant, 502 U.S. 224, 227 (1991) (internal quotation marks omitted).

We conclude that Kesler had actual probable cause to issue the reckless driving citation and to arrest Wood. To show why, we discuss Alabama's reckless driving statute and then the evidence in this case. Ala. Code Section 32-SA-190(a) defines reckless driving as follows:

> Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard for the rights or safety of persons or property, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.

This statute divides the offense of reckless driving into two alternatives. See White v. State, 69 So. 2d 874, 875 (Ala. Ct. App. 1953). The first alternative prohibits driving a vehicle "carelessly and heedlessly in willful or wanton disregard for the rights or safety of persons or property." Ala. Code Section 32-5A1 90(a). The second alternative prohibits driving "without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property." Id.

Under Alabama law, the phrase "without due caution and circumspection" means "no more than negligence." Kirk v. State, 47 So. 2d 283, 285 (Ala. Ct. App. 1950). Wood thus may be guilty of reckless driving by driving negligently and at a speed or in a manner likely to endanger any person or property. Id.; Ala Code Section 325A-l90(a).

Further, under Alabama law, what constitutes reckless driving is generally a question of fact based on the total circumstances. See, e.g., Bailey v. State, 96 So. 2d 829, 829 (Ala. Ct. App. 1957) (evidence sufficient to show reckless driving when defendant sped up upon seeing officers, instigated police chase, and drove seven or eight miles over a rough, slick road at speeds ranging from 75 to 90 mph); Bradford v. State, 47 So. 2d S99, 600 (Ala. Ct. App. l9SO) (evidence sufficient to sustain conviction where defendant

passed two cars on sharp curve driving 70 to 75 mph); see also Malbis Bakery Co. v. Collins, 15 So. 2d 705, 708 (Ala. 1943) (whether allowing four persons to ride in front seat was absence of "due caution and circumspection" was a question of fact under all of the circumstances).[9]

In light of this Alabama law, the evidence shows that Trooper Kesler had actual probable cause to charge Wood with reckless driving. Wood was driving a large tractor truck and hauling yet another vehicle. The interstate highway was reduced to a single lane of traffic due to construction and barrels divided the open and closed lanes. Due to these hazardous conditions, the normal speed limit of 70 mph was reduced to 45 mph. Wood, however, was driving 17 mph over that speed limit. The net result is that Wood was speeding in a large tractor truck in an area of hazardous conditions on an interstate highway. Under these facts, an officer in Trooper Kesler's position had actual probable cause to believe that Wood was violating the reckless driving statute. See Ala. Code Section 32-5A-190(a).

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[9] White, Kirk, Bailey, Bradford and Malbis Bakery all interpreted Title 36, Section 3, Code 1940, a prior version of the reckless driving statute, which was nearly identical to the current version. Title 36, Section 3, Code 1940 read:

> Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful [sic] or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.

Bailey v. State, 96 So. 2d 829, 829 (Ala. Ct. App. 1957) (quoting Title 36, Section 3, Code 1940).

In particular, Wood's speeding, his going 17 mph over the speed limit, is an established fact properly considered in determining if probable cause existed for the reckless driving citation. This is because Wood's conviction for driving at 62 mph in a 45 mph zone collaterally estops him from relitigating the fact of his speeding in this Section 1983 case. See Brown v. City of Hialeah, 30 F.3d 1433, 1437 (11th Cir. 1994) (indicating that collateral estoppel applies in Section 1983 cases and that we determine the preclusive effect of a state court judgment by applying the estoppel rules of that state); Vazquez v. Metro. Dade County, 968 F.2d 1101, 1106 (11th Cir. 1992) (same); Parker v. Williams, 862 F.2d 1471, 1475 n.2 (11th Cir. 1989) ("Defendant Williams had his opportunity to litigate the fact of the rape in his state criminal proceeding. Therefore, collateral estoppel was available to preclude him from relitigating the issue in this [Section 1983] case [against the Macon County, Alabama chief jailer]."), overruled in part on other grounds by Turquitt v. Jefferson County, 137 F.3d 1285 (11th Cir. 1998) (en banc); Marcus v. St. Paul Fire and Marine Ins. Co., 651 F.2d 379, 382 n.3 (5th Cir. Unit B 1981) (applying Alabama law and stating generally that "[a] party may be precluded by factual issues decided against it in a previous case, even if the estoppel is raised in the second case by a litigant who was not a party to the first proceeding in which the issue was determined").[10]

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[10] applies to preclude Wood, as a party to the prior speeding case, from contending in this case that he was not speeding. Many Alabama decisions apply collateral estoppel as long as the party against whom it is asserted was a party, or in privity with a party, in the prior case. See, e.g., McCorkle v. McElwey, 576 So. 2d 202, 205 (Ala. 1991) (stating that "[w]hile the issue preclusion aspect of res judicata does not require complete identity of parties, it does require that the party against whom res judicata is asserted either was a party or was in privity with a party to the prior action"); Constantine v. United States Fid. and Guar. Co.,

Trooper Kesler also had actual probable cause to arrest Wood for refusing to sign the reckless driving citation. Under Alabama law, refusal to sign a citation is cause for a custodial arrest. Gouin v. State, 581 So. 2d 1279, 1282 (Ala. Crim. App. 1991) (citing Ala. Code Section 32-1-4(a) and stating that "the custodial arrest was authorized and justified because the appellant refused to sign the traffic ticket"); Hays v. City of Jacksonville, 518 So. 2d 892, 893

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Inc., 545 So. 2d 750, 755-56 (Ala. 1989); Whisman v. Alabama Power Co., 512 So. 2d 78, 82 (Ala. 1987) (stating "[t]he party identity criterion of res judicata does not require complete identity, but only that the party against whom res judicata is asserted was either a party or in privity with a party to the prior action"); Pearson v. City of Hoover, 706 So. 2d 1251, 1252-53 (Ala Civ. App. 1997).

Other decisions appear to require mutuality, that is both parties must be the same in both suits or in privity with them, and bound by the previous judgment, or neither party may invoke collateral estoppel in the subsequent case. Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 821 So. 2d 158, 165 (Ala. 2001) (stating "Alabama has not followed the trend of abolishing the requirement that parties be identical, sometimes referred to as the mutuality of estoppel requirement" but concluding the corporation was in privity with its sole shareholder and estoppel applied); Redmond v. Bankester, 757 So. 2d 1145, 1150-51 n.2 (Ala. 1999); Hurt v. Pullman Inc., 764 F.2d 1443, 1450-S1 (11th Cir. 1985). Alabama, however, follows an expansive definition of privity, which includes not only a successive interest to the same property right, but also "an identity of interest in the subject matter of the litigation." See, e.g., Leon C. Baker, P.C., 821 So. 2d at 165; see also Dairyland Ins. Co. v. Jackson, 566 So. 2d 723, 726 (Ala. 1990) (collecting cases on "identity of interest" test for privity). Wood was a party in both cases. Although State Trooper Kesler was not a party in the prior case, Kesler acted for the State in charging Wood with speeding in the prior case and shares an identity of interest with the State in the subject matter of the litigation. Thus, any mutuality requirement is satisfied.

(Ala. Crim. App. 1987).[11] There is no dispute that Wood refused to sign the reckless driving citation and that he was aware that if he refused to sign, he would be taken to jail.

In sum, Trooper Kesler had actual probable cause to issue the reckless driving citation and to arrest Wood.[12] Because Wood has not established a Fourth Amendment violation, Trooper Kesler is entitled to qualified immunity on Wood's Section 1983 false arrest claim. See Marx v. Gumbinner, 905 F.2d 1503, 1505-06 (11th Cir. 1990) ("The existence of probable cause . . . is an absolute bar to a section 1983 action for false arrest.").[13]

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[11] In any event, the United States Supreme Court recently has concluded that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

[12] Wood asserts that Kesler's admission that he was not surprised that Wood was found not guilty of reckless driving is somehow evidence that Kesler lacked probable cause. We disagree because the probable cause determination is entirely different from the standard for a conviction. Knight v. Jacobson, 300 F.3d 1272, 1275 (11th Cir. 2002); see also Von Stein, 904 F.2d at 578 n.9 ("'Probable cause' defines a radically different standard than 'beyond a reasonable doubt,' and while an arrest must stand on more than suspicion, the arresting officer need not have in hand evidence sufficient to obtain a conviction.").

Wood also contends that former Mississippi sheriff Payne's testimony that Wood did nothing to constitute reckless driving is evidence of no probable cause. Payne's personal legal conclusion is irrelevant, and we look to the facts to determine probable cause.

[13] While Trooper Kesler had actual probable cause to issue the citation and arrest Wood, we note Kesler also had arguable probable cause, which is all that is required for an arresting officer to be entitled to qualified immunity from a Fourth Amendment claim. Lee, 284 F.3d at 1195; Montoute, 114 F.3d at 184. Trooper Kesler also seeks absolute prosecutorial immunity on the basis that prosecutor Jones directed him to issue the reckless driving citation, and thus that Kesler was

C. Malicious Prosecution

Plaintiff Wood also asserts a Section 1983 claim for malicious prosecution based on Trooper Kesler's issuing the reckless driving citation and arresting him. Our Court has identified malicious prosecution as a violation of the Fourth Amendment and a viable constitutional tort cognizable under Section 1983. See Uboh v. Reno, 141 F.3d 1000, 1002-04 (11th Cir. 1998); Whiting v. Traylor, 85 F.3d 581, 584 (11th Cir. 1996); Kelly v. Curtis, 21 F.3d 1544, 1554-55 (11th Cir. 1994).[14]

To establish a federal malicious prosecution claim under section 1983, the plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to the elements of the common law tort of malicious prosecution. See Uboh, 141 F.3d at 100204; Whiting, 85 F.3d at 584-86; Kelly, 21 F.3d at 1544, 1553-55.[15] As to the constituent elements of the common law

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performing only a prosecutorial function under the direction of a state prosecutor. Because Kesler is entitled to qualified immunity, we need not address absolute immunity.

[14] In Albright v. Oliver, 510 U.S. 266 (1994) (plurality opinion), the Supreme Court concluded that the substantive due process component of the Fourteenth Amendment did not provide the constitutional source of a right to be free from malicious prosecution. But, the Court left open the possibility that the Fourth Amendment is the appropriate source of the right to be free from malicious prosecution. Id. at 274-75. While there is no definitive Supreme Court decision, our Court has recognized the constitutional tort of malicious prosecution under the Fourth Amendment.

[15] In Whiting, we emphasized that the federal right to be free from malicious prosecution "is actually a description of the right to be free from an unlawful seizure which is part of a prosecution." 85 F.3d at

tort of malicious prosecution, this Court has looked to both federal and state law and determined how those elements have historically developed. Uboh, 141 F.3d at 1002-04; Whiting, 85 F.3d at 584-86. For example, in Uboh, this Court examined both federal law and Georgia law and indicated that, for purposes of a Section 1983 malicious prosecution claim, the constituent elements of the common law tort of malicious prosecution included: (1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused. 141 F.3d at 1004.[16]

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584 n.4; see United States Steel, LLC v. Tieco, Inc., 261 F.3d 1275, 1289 n.16 (11th Cir. 2001) (stating "TECO, a corporation, was never arrested, detained, or seized in any way" and "[t]hus, the Fourth Amendment violation envisioned by Whiting could not have occurred in this case"). Other circuits agree. See Lambert v Williams, 223 F.3d 257, 261 (4th Cir. 2000) (citing decisions from the First, Second, Seventh, Tenth and Eleventh circuits and stating that "[o]thers have held that the malicious prosecution claim under Section 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort").

[16] In Uboh this Court stated:

> Because the species of Fourth Amendment violation alleged in this case arises by way of analogy to the common law tort of malicious prosecution, courts historically have looked to the common law for guidance as to the constituent elements of the claim. Georgia law provides that:
>
> > [a] criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action.
>
> O.C.G.A. Section 51-7-40. Further, in order to state a cause of action for malicious prosecution, a plaintiff must allege and prove that the criminal proceeding that gives rise to the action has terminated in favor of the accused. See Kelly v. Serna, 87 F.3d at 1240-41; Heck v. Humphrey, 512 U.S. 477, 484, 114

We note that these are also the same elements required under Alabama law for the tort of malicious prosecution. Delchamps, Inc. v. Bryant, 738 So. 2d 824, 831-32 (Ala. 1999). This Court in Uboh also had to determine whether the common law element of favorable termination was met. 141 F.3d at 1004. To do so, the Uboh Court determined what constituted a favorable termination by examining primarily federal law. Id. at 1004-06. In sum, although both state law and federal law help inform the elements of the common law tort of malicious prosecution, a Fourth Amendment malicious prosecution claim under Section 1983 remains a federal constitutional claim, and its elements and whether they are met ultimately are controlled by federal law.[17]

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S.Ct. 2364, 2371,129 L.Ed.2d 383 (1994) ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.").

141 F.3d at 1004. In Uboh, the plaintiff initially filed his action against the defendant federal officers pursuant to 42 U.S.C. Section 1983, but later amended the complaint to allege correctly a cause of action within the framework of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 4Q3 U.S. 388 (1971). 141 F.3d at 1001 n.2. Although technically a Bivens action, Uboh essentially treated the constitutional tort of malicious prosecution under the Fourth Amendment as having the same elements whether brought under Section 1983 against state actors or under Bivens against federal actors.

[17] See Green v. Montgomery, 219 F.3d 52, 60 n.2 (2d Cir. 2000) ("[The] federal law of probable cause - not state law - should determine whether a plaintiff has raised a genuine issue of material fact with respect to a Section 1983 malicious prosecution claim."). When malicious prosecution is brought as a federal constitutional tort, the outcome of the case does not hinge on state law, but federal law, and does not differ depending on the tort law of a particular state.

In this case, Wood's Section 1983 malicious prosecution claim is that Trooper Kesler maliciously issued a reckless driving citation without probable cause and caused him to be unreasonably "seized" by making a custodial arrest on that charge when he refused to sign the citation. While a seizure (i.e., an arrest in fact) occurred in the course of the prosecution, Wood has not shown that Kesler acted without probable cause, which is a required element of Wood's Section 1983 malicious prosecution claim. As outlined above, Trooper Kesler had actual probable cause to issue the reckless driving citation and for the custodial arrest, and thus, that probable cause bars his Section 1983 malicious prosecution claim.

Because Wood has not shown a Fourth Amendment violation, Trooper Kesler is entitled to qualified immunity on Wood's Section 1983 malicious prosecution claim.

D. Retaliation

Wood also asserts a Section 1983 retaliation claim based on Kesler's conduct. Although Wood attempts to rely on the Fourth Amendment, there is no retaliation claim under the Fourth Amendment separate and distinct from Wood's malicious prosecution and false arrest claims.[18] Instead, the only cause of action for retaliation that arguably applies here is retaliatory prosecution in violation of the First Amendment.

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[18] Wood points to Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996) and Jones v. Cannon, 174 F.3d 1271 (11th Cir. 1999), but Whiting involved a malicious prosecution claim under the Fourth Amendment, and Jones concerned a false arrest claim under the Fourth Amendment. Neither decision supports a separate and distinct retaliation claim under the Fourth Amendment.

That retaliatory prosecution claim, however, is also defeated by the existence of probable cause. See Dahl v. Holley, 312 F.3d 1228, 1236 (11th Cir. 2002) (affirming summary judgment on retaliatory arrest claim in violation of plaintiff's First Amendment rights and stating that "[w]hatever the officers' motivation, however, the existence of probable cause ... defeats her ... claim"); Redd v. City of Enterprise, 140 F.3d 1378, 1383 (11th Cir. 1998) ("Because we hold that the officers had arguable probable cause to arrest [the plaintiff] for disorderly conduct, we must hold that the officers are also entitled to qualified immunity from the plaintiffs' First Amendment claims."); Keenan v. Tejada, 290 F.3d 252, 260 (5th Cir. 2002) (noting that "retaliator) criminal prosecutions in violation of the First Amendment are actionable only if a plaintiff can also prove the common-law elements of malicious prosecution, including the absence of probable cause to prosecute"). Therefore, Kesler is entitled to qualified immunity on Wood's Section 1983 retaliation claim.

## IV. DISCRETIONARY-FUNCTION IMMUNITY

Plaintiff Wood also asserted state law claims for malicious prosecution and false arrest; however, Trooper Kesler is entitled to Alabama's discretionary function immunity on Wood's state law claims.

In Alabama, law enforcement officers, such as Trooper Kesler, enjoy statutory immunity from suit for the "performance of any discretionary function within the line and scope of his or her law enforcement duties." Ala. Code

Section 6-5-338.[19] "Under discretionary-function-immunity analysis, a court first determines whether the government defendant was performing a discretionary function when the alleged wrong occurred; if so, 'the burden shifts to the plaintiff to demonstrate that the defendant[ ] acted in bad faith, with malice or willfulness in order to deny [him] immunity.'" Scarbrough v. Myles, 245 F.3d 1299, 1303 n.9 (11th Cir. 2001) (alteration in original) (applying Alabama law and quoting Sheth v. Webster, 145 F.3d 1231, 1239 (11th Cir. 1998)). Discretionary acts are "'those acts as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances.'" Sheth, 145 F.3d at 1239 (quoting Wright v. Wynn, 682 So. 2d 1, 2 (Ala. 1996)); see Ex Parte City of Montgomery, 758 So. 2d 565, 570 (Ala. 1999).

Under Alabama law, Kesler's issuance of the reckless driving citation and arrest of Wood were discretionary acts for immunity purposes. Ex Parte City of Montgomery, 758 So. 2d at 570; Wright, 682 So. 2d at 2. Furthermore, Wood has not presented any evidence that Kesler acted in bad faith, maliciously or willfully to deny him discretionary-function immunity. Wood stresses that Kesler did not respond to his subpoena request and that Kesler asked Wood about this request during the ride to the jail. Kesler, however, showed the subpoena request to his superiors and

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[19] See also Ala. Const. art. I, Section 14. This provision also affords certain immunity to state agents in their individual capacities. See, e.g., Ex Parte Butts, 775 So. 2d 173, 177-78 (Ala. 2000); Ex Parte Cranman, 792 So. 2d 392 (Ala. 2000). We need not address the scope of this constitutional immunity as Trooper Kesler is entitled to statutory immunity in any event.

was advised that he was not required to produce the records. There is no evidence of any malicious motive.

Wood further contends that Kesler's delay in issuing the reckless driving citation and his asking about Wood's not guilty plea evidence Kesler's bad faith. Although Kesler did not issue the citation at the scene on March 30 and allegedly asked about Wood's not guilty plea, this does not alter the fact that he had probable cause to issue it. The existence of probable cause, and in particular the facts showing that probable cause, contradict any suggestion of malicious intent or bad faith. See Ex Parte City of Montgomery, 758 So.2d at 570. Further, even assuming the ultimate decision to issue the reckless driving citation was Kesler's, he acted on prosecutor Jones's request, which further defeats the claim of malice or bad faith. Thus, we conclude that under Alabama law Trooper Kesler is entitled to discretionary-function immunity on Wood's state law claims for false arrest and malicious prosecution.

## V. CONCLUSION

For these reasons, we reverse the denial of defendant Kesler's motion for summary judgment and remand this case to the district court for entry of final judgment in favor of Trooper Kesler on all of Wood's claims.

**REVERSED AND REMANDED**

Appendix B - Opinion and Order of the United States District Court for the Northern District of Alabama Dated and Filed September 19, 2001

## MEMORANDUM OPINION

Currently before the court is the Motion for Summary Judgment filed by defendant Michael Kesler ("defendant" or "Kesler"). Plaintiff Michael Alan Wood ("plaintiff" or "Wood") filed this action against defendant, an Alabama State Trooper, in his individual and official[1] capacities, on September 23, 1999, alleging the following claims: (1) violation of civil rights under 42 U.S.C. Section 1983, (2) civil rights conspiracy under 42 U.S.C. Section 1985,[2] (3) malicious prosecution under Alabama state law, and (4) false arrest under Alabama state law. The court is of the opinion that defendant's Motion is due to be granted in part and denied in part.

## I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party asking for summary judgment bears the initial burden of showing that no genuine issues exist. *See Clark v. Coats & Clark Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *see Adickes v. S.H. Kress &*

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[1] Plaintiff has conceded that summary judgment is due to be granted as to all claims against defendant in his official capacity. (*See* Memorandum in Opposition to Motion for Summary Judgment ("Pl.'s Br.") at 16.)

[2] Plaintiff has conceded that summary judgment is due to be granted on this claim. (*See* Pl.'s Br. at 14.)

*Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and show that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1096). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the judge's function is not to '"weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. Credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are left to the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *See id.* at 255. Nevertheless, the nonmovant need not be given the benefit of every inference but only of every reasonable inference. *See Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n. 12 (11th Cir. 1988).

## II. FACTUAL SUMMARY

On March 30, 1998, plaintiff was driving a mobile home hauler, which is a commercial vehicle designed to pull a mobile home, northbound on 1-65.[3] (DX A at 99, PX B at 1.)[4] Bob Payne ("Payne"), a former Sheriff of Tishmingo

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[3] Plaintiff was not hauling a mobile home, but was instead carrying a pickup truck "piggyback," so that the pickup truck was completely off the ground. (DX A at 100-01.) The pickup truck was to be the "escort vehicle" once the mobile home was loaded onto the hauler. (*Id.*)

[4] The exhibits attached to Defendant's Motion for Summary Judgment will be referred to as "DX," followed by the corresponding tab letter. Plaintiff's Evidentiary Submissions in Opposition to Motion for

County, Mississippi, was traveling with plaintiff. (PX A at 1.) David Martin ("Martin") was driving another mobile home hauler behind plaintiff. (PX A at 1; PX B at 1; DX A at 100-03.) Both plaintiff and Martin were traveling from Red Bay, Alabama, to Nashville, Tennessee, to pick up mobile homes for transport. (PX A at 1; PX B at 1.) Defendant, an Alabama State Trooper, was on duty checking northbound traffic on I65 north of Athens, Alabama, and south of the Elkmont exit, which was under construction and had been reduced to a single lane of traffic. (PX A at 1; PX B at 1; DX A at 88-89.) Only the left lane of the northbound interstate was open to traffic. (DX A at 89-90.) There were marked barrels on the interstate between the left lane and the right lane of northbound traffic. (*Id.* at 90-91.) Defendant was parked in the right lane, which was closed to traffic, with his vehicle facing directly south. (*Id.* at 88-91.) The normal speed limit for that area was seventy miles per hour, but due to the construction, the speed limit had been reduced to forty-five miles per hour. (*Id.* at 94-95.) Defendant stopped both plaintiff and Martin, and cited both for speeding and failing to have a log book. (PX B at 1-2; PX A at 1-2; DX A at 95-96 and Exs. 11-14.)[5] Martin testified that neither vehicle was speeding. (PX B at 1).[6] In the initial report of the incident, defendant stated:

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Summary Judgment will be referred to as "PX," followed by the corresponding tab letter.

[5] Defendant asserts that after both trucks passed him, he turned around and pulled behind Martin's truck. (PX E at 100.) However, other witnesses have contradicted defendant, noting that he pulled out between the two trucks and almost collided with Martin's vehicle. (PX A at 1; PX B at 1.) Plaintiff asserts that this discrepancy puts defendant's credibility at issue. (*See* Pl.'s Br. At 9 n.2.)

[6] Specifically, Martin stated:

> This particular morning these two vehicles were traveling North well above the posted limit when they reached this point. The driver of the first truck, once realizing I was there, quickly decelerated, momentarily loosing [sic] traction, to just above the speed limit. My clock on him, with a tracking history, was 62 mph. The second truck, running faster than the first, also slammed on his brakes, causing his truck to slide sideways. He barely kept control of it and on the roadway went by at 64 mph with a tracking history.

(PX F at 19-20; *see also* PX E 104-06.) Defendant testified at his deposition that upon realizing that defendant was monitoring traffic, plaintiff quickly decelerated to just above the speed limit and lost traction for maybe a second. (DX A at 105-06.) Defendant also contends that upon pulling both drivers over, he informed them that their conduct constituted reckless driving, but in his discretion chose not to issue citations for this offense. (DX A at 129-42.)

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> I am familiar with Interstate 65 leading to Nashville, Tennessee. I was aware of the construction area on I-65 north of Athens, Alabama. On this date, I had my citizen's band radio on and was aware that there was a State Trooper in the construction zone. I was traveling between 45-50 mph as I entered the construction zone.... I was following Alan Wood at a distance of approximately 250 feet. I noted as we approached this overpass, that Alan Wood had slowed his vehicle to approximately 45-50 mph. I lost sight of his vehicle as he went over the overpass in front of me.... I had to immediately brake when I saw the State Trooper's car blocking my lane.

(PX B at 1-2.)

The citations issued on March 30, 1998, set the initial court appearance for May 4, 1998. (PX D at 12, 17; DX A at Exs. 11-14.) Plaintiff appeared at the Limestone County Courthouse on May 4, 1998, plead not guilty to the offenses for which he had been cited, and requested a trial date. (*See* PX D at 13, 18; PX G at 63.) The trial was set for July 8, 1998. (PX G at 63.) On June 26, 1998, Wood, as *pro se* plaintiff, requested a subpoena for records from defendant. (PX D at 21; PX E at 159.) Upon receiving the subpoena, defendant failed to provide the requested documents or respond in any way. (PX E at 159-61.)

Martin entered into a plea agreement with Brian Jones ("Jones"), the assistant district attorney, on July 8, 1998, the date of trial. (PX H at 2.)[7] Martin's plea agreement included a $20.00 fine plus court costs for the log book violation and dismissal of the speeding violation upon payment of court costs and successful completion of driving school. (See PX H; PX G at 69-70.) Plaintiff refused Jones's offer of a plea bargain, which included a $380.00 fine for the log book violation and dismissal of the speeding violation upon payment of the court costs and successful completion of driving school. (PX G at 72-73.) When plaintiff refused the plea bargain, defendant issued plaintiff a new citation for reckless driving. (PX D at 1; PX G at 7375.) Defendant asserts that Jones directed him to write plaintiff a ticket for reckless driving. (DX A at 166-73, 182-83; DX C at 100-03, 110-113, 115-17.) When asked whether he instructed defendant to write plaintiff a ticket for reckless driving, Jones testified that he "advised

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[7] Plaintiff flied a Supplementary Evidentiary Submission in Opposition to Defendant's Motion for Summary Judgment, with Exhibit H attached thereto. This evidence will be referred to as "PX H."

[Kesler] of the charge of reckless driving." (DX C at 113-16.)

Defendant issued the citation for reckless driving inside the Limestone County Courthouse over three months after he stopped plaintiff for speeding (PX G at 74-75.) Plaintiff refused to sign the ticket for reckless driving despite being informed that it was not an admission of guilt and would result in his being arrested and taken to jail. (*Id.* at 75-76.) Defendant then arrested plaintiff for the reckless driving offense and took him to the Limestone County Jail. (*Id.* at 76-80.) On the way to the jail, defendant questioned plaintiff as to why he had not taken the plea agreement and why plaintiff had requested defendant's records. (*Id.*) Plaintiff was in jail approximately four or five hours before being released. (*Id.* at 80.)

Because plaintiff was arrested for reckless driving and taken to jail, no trial was held on July 8, 1998, for the speeding or log book violations. (PX D at 13, 18.) At the trial for the reckless driving offense, which was held on September 2, 1998, plaintiff was found not guilty. (PX D at 2.)

## III. DISCUSSION

### A. Section 1983 Claim

Section 1983 of Title 42 of the United States Code states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To obtain relief under Section 1983, a plaintiff must show that he or she was deprived of a federal right by a person acting under color of state law. *Patrick v. Floyd Medical Center*, 201 F.3d 1313, 1315 (11th Cir. 2000). Section 1983 is not a source of substantive federal rights. *Whiting v. Traylor*, 85 F.3d 581, 583 (11th Cir. 1996) (citations omitted). Instead, to state a claim under Section 1983, a plaintiff must point to a violation of a specific federal right. *Id.* Plaintiff appears to allege that defendant's actions in writing him a ticket for reckless driving constituted malicious prosecution, false arrest, and retaliation in violation of the Fourth and Fourteenth Amendments to the United States Constitution. (*See* Pl.'s Br. at 10-13.)

"An individual's right to be free from unlawful arrest and imprisonment implicates a liberty interest undisputably protected by the Constitution and federal laws, the violation of which may give rise to a cause of action under Section l 983." *Motes v. Myers*, 810 F.2d 1055, 1059 (11th Cir. 1987). Under the Fourth Amendment, which is made applicable to the States through the Fourteenth Amendment, persons have the right not to be arrested without probable cause. *Id.*; *Rose v. Town of Jackson's Gap*, 952 F. Supp. 757, 763 (M.D. Ala. 1996); *see also Jones v. Cannon*, 174 F.3d 1271, 1283 (11th Cir. 1999) (arrest without probable cause is unconstitutional). Plaintiff has asserted a violation of his constitutional rights in that he

alleges his arrest was not based on probable cause, and, thus, was unlawful.

As to plaintiff's claim of retaliation, defendant contends that "[w]hile there are a number of cases dealing with actions by the police which interfere with the free exercise of speech, press and association or which interfere with religious liberties, the Defendant has found no Eleventh Circuit case dealing with retaliation as alleged in the Complaint." (Memorandum Brief in Support of Motion for Summary Judgment ("Def.'s Br.") at 5.) Plaintiff, however, argues:

> The Eleventh Circuit has confirmed a retaliation claim against police officers in a number of cases.... The allegation of retaliation was present in *Whiting v. Traylor*, 85 F.3d 581 (11th Cir. 1996) involving a law enforcement officer who arrested plaintiff after he pled not guilty to charges the of officer originally made against him. Judge Edmonson wrote for the Court: "[P]laintiff's allegations point to three possibly unlawful seizures: his surrender following the issuance of the arrest warrant, his arrest as he left the courtroom, and his being required to appear to answer the charges after being released on bond. If these alleged acts are seizures and are unlawful, they - whether or not there is a federal 'right' (even in the absence of some moment of physical restraint) not to be prosecuted in state court without probable cause - are the proper basis for a section 1983 claim." *Id.* at 584. A similar claim was upheld in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999) where a police officer charged plaintiff with a traffic offense after he had been previously acquitted in an earlier criminal proceeding. Judge

> Hull writing for the Court in reversing summary judgment based upon the police officer's claim of qualified immunity noted: "Viewing the record in the light most favorable to Jones, we conclude that Jones has articulated a viable Section 1983 claim against Powers based on his allegedly false traffic arrest of Jones without arguable probable cause in October 1994, after Jones was acquitted of the murder charges. If the jury believed Jones' version of the events, Powers issued a traffic citation to Jones for following Powers' vehicle too closely when Powers knew Jones had not done so and that there was no arguable probable cause for the traffic stop and citation." Id. at 1292. The same conclusion - that summary judgment is inappropriate based on the factual record in this case - is warranted. [T]he issuance of the reckless driving citation was in retaliation for Wood insisting on his Constitution[al] right to a trial on the speeding and log book tickets and refusing a plea bargain. The reckless driving citation was issued without any probable cause. As all matters involving Kesler's claim for qualified immunity have been [controverted] summary judgment is not warranted under the facts of this case.

(Pl's Br. at 11- 13.) After reviewing the cases cited by plaintiff, the court is of the opinion that these two cases provide the basis for plaintiff's claims under Section 1983 based on malicious prosecution and false arrest. Thus, plaintiff's claim of retaliatory prosecution is essentially a claim for malicious prosecution. The fact that the arrest may have been retaliatory does not constitute a separate

claim.[8] These claims are one and the same. Thus, the court concludes that plaintiff has asserted a viable Section 1983 claim based on the allegedly false arrest and malicious prosecution.

*1. Absolute Immunity*

Although the text of Section 1983 does not explicitly provide immunity, the Supreme Court has reasoned that at the time Congress enacted Section 1983, Congress intended to incorporate the common law immunities then available. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986); *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (197G). "Thus, determination of absolute immunity under Section 1983 is not a policy determination, but involves a historical exercise." *Jones*, 174 F.3d at 1281. The Supreme Court and lower courts have developed a "functional approach" to determine whether executive branch public officials should be granted absolute immunity for taking particular actions, or whether they should enjoy instead only the qualified immunity normally afforded public officials. *See, e.g, id* at 1282.

In determining absolute immunity, the court must examine the "nature of the function performed, not the identity of the actor who performed it." *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997). If the function is similar to a function which would have been immune when Congress enacted Section 1983, and if a court determines that Section 1983's history or purposes support special protection for the

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[8] The court is unaware of any controlling case concluding that claims for retaliatory prosecution and malicious prosecution are separate and distinct claims under Section 1983.

activity, then the court will hold the official absolutely immune from liability. *Jones*, 174 F.3d at 1282. State officials who would not normally enjoy absolute immunity from suit may be entitled to such immunity when they are acting at the direction of an official having such immunity. *C.f. Roland v. Phillips,* 19 F.3d 552, 555 (11th Cir. 1994) ("Absolute immunity for officials assigned to carry out a judge's orders is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel. A lesser degree of immunity could impair the judicial process."); *Mauldin v. Burnette*, 89 F. Supp. 2d 1371, 1380 (M.D. Ga. 2000) ("Law enforcement officers who execute facially valid court orders in their law enforcement capacities are cloaked with absolute quasi- judicial immunity.... Even an unlawful or erroneous order can be considered a 'facially valid order.'. . . Moreover, it is irrelevant for purposes of absolute quasi-judicial immunity whether the order at issue is written or verbal.") (citations and quotations omitted); *International Molders and Allied Workers, AFL-CIO v. Buchanon Lumber Birmingham*, 459 F. Supp. 950, 952 (N.D. Ala. 1978) (Law enforcement personnel acting under the judge's order are entitled to quasi-judicial immunity.).

Defendant alleges that in writing plaintiff a ticket for reckless driving, he was acting at the direction of the District Attorney. (Def.'s Br. at 9.) Therefore, defendant contends that he was "performing a prosecutorial function and should enjoy the same immunity as the District Attorney, which this Court recognized in dismissing Brian Jones as a Defendant in this case." (Def.'s Br. at 9.) The court disagrees with defendant's assertion that he is entitled to absolute immunity because he was acting at the direction of the district attorney.

The court acknowledges that prosecutors enjoy absolute immunity for the initiation and pursuit of criminal prosecution. *See, e.g, Imbler*, 424 U.S. at 431. Further, a prosecutor is absolutely immune from suit for malicious prosecution. *Jones*, 174 F.3d at 1271 (citing *Imbler*, 424 U.S. at 420-21). Such absolute immunity extends to a prosecutor's "acts undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." *Buckley*, 509 U.S. at 273. Although absolutely immune for actions taken as an advocate, the prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the State. *See id.* at 269-70, 273.

As noted above, a prosecutor is absolutely immune for prosecutorial functions. *Jones*, 174 F.3d at 1281-82 (emphasis added). However, defendant was not engaging in a *prosecutorial* function. Defendant did not prosecute plaintiff; rather he arrested him. Despite defendant's argument that in arresting plaintiff he was acting at the direction of the district attorney, defendant has provided nothing to demonstrate that the district attorney was permitted to give such an order or that defendant was permitted to act on such an order. Moreover, defendant's assertion does not comport with controlling case law. *See Burns v. Reed*, 500 U.S. 478, 496 (1991) (concluding that a defendant prosecutor was not entitled to absolute immunity for giving certain legal advice to the police during an investigation); *Buckley*, 509 U.S. at 273-74 (noting that prosecutor is not entitled to absolute immunity when he "performs the investigative functions normally performed by a detective or police officer" and that prosecutor cannot be acting as advocate before there is probable cause); *accord Prince v. Hicks*, 1 98 F.3d 607, 611 (6th Cir. 1999)

(prosecutor who performs the investigative functions normally performed by a detective or police officer such as searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested is entitled only at most to qualified immunity). Further, as pointed out by plaintiff, "[the evidence . . . shows that Kesler submitted an Alabama Uniform Traffic Complaint ["UTC"] in which he swore to facts claiming probable cause [relating to the reckless driving offense] before Limestone County Magistrate Myra Peck. There is no mention on the UTC affirmation that Kesler was doing this upon instruction from Brian Jones," or any other district attorney. (Pl.'s Br. at 13 (citing PX D at 1).) Thus, the court is of the opinion that defendant is not entitled to absolute immunity relating to his actions in arresting plaintiff for reckless driving.

*2. Qualified Immunity*

a. Guiding Principles

Even though the actions of public officials may have violated a plaintiff's constitutional rights, qualified immunity shields public officers from personal liability if those constitutional acts did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine the propriety of qualified immunity, the official's conduct is evaluated under an objective standard. *See Anderson v. Creighton*, 483 U.S. 63S, 638-39 (1987). The official's subjective intent is irrelevant to the inquiry. *See Graham v. Connor*, 490 U.S. 386, 397 (1989); *Hutton v. Strickland*, 919 F.2d 1531, 1540 (11th Cir. 1990) ("'the purpose of qualified immunity would be defeated if courts were to ascertain and analyze

the subjective thoughts of government officials instead of basing judicial decisions on objective actions resulting from surrounding circumstances.").[9] The test for whether a governmental official is entitled to qualified immunity from Section 1983 liability in his or her individual capacity involves a two-step analysis: (1) the official must first demonstrate that he or she was acting within the scope of his or her discretionary authority when the allegedly wrongful acts occurred; and (2) the burden then shifts to the plaintiff to show lack of good faith on the official's part. *Rich v. Dollar*, 84 1 F.2d 1558, 1563-64 (11th Cir. 1988). The plaintiff's burden is met by proof demonstrating that the official's actions violated clearly established constitutional law. *Id.* Thus, in order to defeat defendant's right to qualified immunity, plaintiff must demonstrate (1) that defendant's conduct violated his clearly established Fourth Amendment rights, and (2) that a reasonable government official would have been aware of those rights. *See Vista Community Service v. Dean*, 107 F.3d 840, 844 (11th Cir. 1997). "For qualified immunity to be surrendered, preexisting law must dictate, that is truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable

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[9] The court further notes:

> Because qualified immunity is evaluated under a purely objective standard without consideration for the government actor's subjective belief, evidence of improper motive is generally irrelevant to qualified immunity analysis. However, evidence of improper motive is an essential component of the plaintiff's affirmative case. Consequently, qualified immunity may protect a defendant from civil liability even when an issue of fact remains as to whether the defendant acted with subjective discriminatory intent.

*Connor v. Halifax Hosp. Med. Ctr.*, 135 F. Supp. 2d 1198, 1217 (M.D. Fla. March 5, 2001) (citing *Koch v. Rugg*, 221 F.3d 1283, 1293 (11th Cir. Aug. 11, 2000); *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996)).

government agent that what the defendant is doing violates federal law in the circumstances." *Lassiter v. Alabama A & M University, Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994). An important policy reason underlying the doctrine of qualified immunity is the "strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998) Qualified immunity is intended to protect all but the plainly incompetent or those who knowingly violate the law. *See, e.g, Lassiter*, 28 F.3d at 1149 (citing *Malley*, 475 U.S. at 341). Entitlement to immunity is the rule, rather than the exception. *See id.* ("only in exceptional cases will government actors have no shield against claims made against them in their individual capacities").

b. Application to the Facts of this Case

As noted above, plaintiff has asserted a violation of his constitutional rights under the Fourth and Fourteenth Amendments. Further, defendant has asserted a qualified immunity defense. Thus, defendant must first demonstrate that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *See, e.g., Rich*, 841 F.2d at 1563-64. "A government official proves that he acted within the purview of his discretionary authority by showing objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Hutton*, 919 F.2d at 1537 (internal quotations and citations omitted). It is not disputed that defendant, at all times relevant to plaintiff's claims, was acting within his discretionary authority as a police officer.

Under the second prong of the qualified immunity analysis, plaintiff must demonstrate that defendant violated clearly established statutory or constitutional law in making this arrest. *See, e.g., Harlow*, 457 U.S. at 818; *Lassiter*, 28 F.3d at 1150. For the right to be clearly established, "[t]he contours of the right must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. In other words, plaintiff must show that when defendant falsely arrested him, the law was developed in such a concrete and factually defined context to make it obvious to all reasonable government actors in defendant's place that what he was doing violated federal law. *See Braddy v. Florida Dep't of Labor & Employment Security*, 133 F.3d 797, 801 (11th Cir. 1998) (quoting *Jones v. City of Dothan, Ala.*, 121 F.3d 1456, 1459 (11th Cir. I997)). Thus, the qualified immunity standard compels courts to undertake a fact-intensive inquiry. *See Samarco v. Neumann*, 44 F. Supp. 2d 1276, 1292 (S.D. Fla. 1999) (citing *Jones*, 121 F.3d at 1459).

As stated by the Eleventh Circuit:

> The plaintiff opposing summary judgment has the burden of showing that a genuine dispute on a material issue of fact exists.... Conclusory allegations ... or evidence setting forth legal conclusions are insufficient to meet the plaintiff's burden.... The proper test for qualified immunity as set out by this court is:
>
> The objective nature of qualified immunity defines what fact issues are material for summary judgment purposes. To avoid summary judgment it is not enough for a plaintiff to produce evidence, which --

> if believed (for summary judgment its truth is assumed) -- would allow a fact-finder to find just that the government-agent defendant was, in reality, wrong about the facts on which the defendant acted. Instead, to defeat summary judgment because of a dispute of material fact, a plaintiff facing qualified immunity must produce evidence that would allow a fact-finder to find that no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts. *See Sims v. Metropolitan Dade County*, 972 F.3d 1230, 1234-35 (11th Cir. 1992) (illustrating what kinds of fact issues are material to qualified immunity).

*Wood v. City of Lakeland, FL*, 203 F.3d 1288, 1292 (11th Cir. 2000). The Eleventh Circuit has also stated that "qualified immunity presents a question of law for the court to decide, preferably on pretrial motions" and "the issue should not be submitted to the jury." *Sims*, 972 F.2d at 1234 (citing *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991)). However, although a plaintiff's allegations may suffice to survive a motion for summary judgment, he may be unable to adduce sufficient evidence to survive a motion for a directed verdict based on qualified immunity. *Id.*

At the time of defendant's actions on July 8, 1998, the law was clearly established that an arrest without probable cause violates the arrestee's Fourth and Fourteenth Amendment rights, and in order for a police officer to be entitled to qualified immunity, he must have at least arguable probable cause for the arrest. *See, e.g., Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998); *Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997), *cert. denied*, 525 U.S. 870 (1998); *Bailey v. Board of County Comm'rs of Alachua County, Fla.*, 956 P.2d 1112, 1119

(11th Cir. 1992); *Lindsey v. Storey*, 936 F.2d 554, 562 (11th Cir. 1991). Thus, under clearly established law, defendant will be entitled to qualified immunity if there was arguable probable cause for the arrest. *Jones*, 174 F.3d at 1283 ("Qualified immunity will shield [the defendant police officers] from a claim of false arrest without probable cause if there was arguable probable cause."); *see also Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) (Arresting officers are entitled to qualified immunity where there is arguable probable cause.).

Arguable probable cause exists if a reasonable police officer, knowing what defendant knew, could have believed there was probable cause for the warrantless arrest.[10] *See Gold*, 121 F.3d at 1445. It is "inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . in such cases those officials . . . should not be held personally liable." *Anderson*, 483 U.S. at 641. Thus, "what

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[10] "[P]robable cause exists whenever the facts and circumstances known to the officer, and of which he has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. The currency of probable cause is probability, not legal certainty; it may exist even though the evidence before the officer is insufficient to convict." *United States v. Tinkle*, 655 F.2d 617, 621 (5th Cir. 1981) (citing *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925)); see also *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995).

The arguable probable cause inquiry is a lesser standard and is distinct from the actual probable cause inquiry. *See, e.g., Gold*, 121 F.3d at 1446. Under arguable probable cause, the inquiry is not whether probable cause actually existed, but instead whether an officer reasonably could have believed that probable cause existed, in light of the information the officer possessed. *See Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997).

counts for qualified immunity purposes relating to probable cause to arrest is the information known to the defendant officers or officials at the time of their conduct, not the facts known to the plaintiff then or those known to a court later." *Jones*, 174 F.3d at 1283 n.4.

Plaintiff claims that summary judgment is inappropriate in this case because the facts relating to whether probable cause existed to support the charge of reckless driving are in dispute. (See Pl.'s Br. at 7-13.) To support this assertion, plaintiff points out that (1) "Witness Payne, a former sheriff for Tishmongo County, Mississippi who was a passenger in Wood's vehicle, has offered testimony that Wood did not 'lock his brakes, swerve, or loose [sic] control of the truck;'" (2) "Payne further noted that '[n]othing that Alan Wood did in operating the truck cab in which I was a passenger amounted to reckless driving;" (3) "Martin . . . stated that neither his truck or Wood's was going faster than 45-50 mph when they entered the construction area;" (4) Martin also "noted [that] Wood did not lock the wheels on his truck or do anything that caused him to lose control of his vehicle;" (5) "Wood has also denied any driving conduct which would constitute reckless driving;" (6) "Kesler's version of the facts supplied in his summary judgment brief point to a lack of probable cause.... Kesler has offered in [his] brief [that] Wood 'quickly decelerated, momentarily losing traction to just above the speed limit. Mr. Wood lost traction for maybe a second;'" and (7) "Kesler admitted that he was not surprised in the not guilty verdict when the reckless driving ticket was tried." (Pl.'s Br. at 7-9 (citing PX A at 2; PX B at 1-2; PX F at 19-20; PX G at 53-57, 75; DX A 105-06; Def.'s Br. at 2.)) Further, plaintiff notes that defendant did not issue the citation until three months after the initial stop when plaintiff refused to accept the plea agreement, (Pl.'s Br. at

3), and Martin, who was following plaintiff, and who, according to defendant's testimony, was driving more egregiously, was not issued a ticket for reckless driving, (*id.* at 9).

Defendant asserts that "[t]he actions of Mr. Wood . . . as [he] perceived them [were] that Mr. Wood was speeding in a construction zone in a commercial vehicle and that he momentarily locked his wheels endangering Trooper Kesler's patrol vehicle," and that "[t]hese facts [constitute] sufficient probable cause to issue a citation to Mr. Wood for Reckless Driving."[11] (Def.'s Br. at 5.) Defendant alleges:

> Mr. Wood also does not contradict Trooper Kesler's statement as to what his radar read on the occasion. Mr. Wood simply denies that he was going over 45 mph. A general denial of guilt, however, does not create a jury question on the issue of probable cause.... [Tlhe undisputed facts as known to Defendant Kesler [were] that his radar showed the Plaintiff traveling 61 mph in a 45 mph speed zone and Kesler believed Wood locked his brakes.

(Defendant's Reply Brief ("Def.'s Reply") at 3.) Further, defendant asserts that, "[a]t the very least, these facts

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[11] Under Alabama law, reckless driving is defined in the following manner:

> Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard for the rights or safety of persons or property, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.

Ala. Code Section 32-5A-190.

amount to arguable probable cause and Trooper Kesler would be entitled to a qualified good faith immunity from suit." (Def.'s Br. at 5.)

The court is mindful that a plaintiff who alleges Section 1983 individual capacity liability against a public official faces a demanding burden. However, this burden is not insurmountable. *See Jones*, 174 F.3d at 1283-84 ("Viewing the evidence in [plaintiff's] favor, there is sufficient evidence from which a jury could find that [plaintiff] did not confess during his interview with [the defendant officers], and that [the defendant officers] knew that [plaintiff] had not confessed. No reasonable police officer, knowing these same facts, could have believed that there was probable cause to arrest [plaintiff]. Stated differently, absent the confession there was no arguable probable cause for the warrantless arrest. Therefore, [the defendant officers] are not entitled to absolute or qualified immunity for the initial warrantless arrest of [plaintiff]."); *Penn v. City of Miami*, 1999 VVL 1050059, at *18 (S D. Fla. Sept. 7, 1999) ("'Plaintiff has presented evidence to meet her burden of raising a genuine issue of material fact whether [defendant] was aware that he was violating a clearly established federal right when he arrested Plaintiff while possessing knowledge that Plaintiff was [not violating the law]. A jury could find that [defendant] was either plainly incompetent or that he knowingly violated the law.... Accordingly, Plaintiff has sustained a triable issue as to the individual liability of [defendant]. Although [defendant] may raise the defense of qualified immunity at trial, the issue will be resolved by a jury based on the evidence presented."), aff'd. 221 F.3d 1357 ( 11th Cir. 2000).

Viewing the evidence in the light most favorable to plaintiff, there is sufficient evidence from which a jury

could find that plaintiff was not driving recklessly and defendant knew plaintiff was not driving recklessly. If the jury believed plaintiff's version of the facts under which defendant arrested plaintiff for reckless driving, then defendant knew plaintiff was not driving recklessly and there was no arguable probable cause for the traffic citation. Thus, assuming the facts as alleged by plaintiff, no reasonable police officer could have believed that there was probable cause to arrest plaintiff. Therefore, plaintiff has met his burden of raising a genuine issue of material fact and has articulated a viable Section 1983 claim against defendant based on the allegedly false traffic arrest of plaintiff. Defendant is not entitled to summary judgment based on the defense of qualified immunity.

**B. State Law Claims**

*1. Malicious Prosecution*

Plaintiff also asserts a claim for malicious prosecution. In order to establish a claim for malicious prosecution, plaintiff must establish:

(1) A judicial proceeding initiated by the defendant,
(2) The lack of probable cause;
(3) Malice on the part of the defendant;
(4) Termination of the proceedings in favor of the plaintiff; and
(5) Damage to the plaintiff as a result.

*See, e.g., Delchamps Inc. v. Bryant*, 738 So. 2d 824, 831-32 (Ala. 1999); *Montgomery v. City of Montgomery*, 732 So. 2d 305, 309 (Ala. Civ. App. 1999). Malicious prosecution is an action disfavored in the law. *Cutts v. American United Life Ins. Co.*, 505 So. 2d 1211, 1214 (Ala. 1987);

*Montgomery*, 732 So. 2d at 309. The reason for such disfavor is:

> [P]ublic policy requires that all persons shall resort freely to the courts for redress of wrongs and to enforce their rights, and that this may be done without the peril of a suit for damages in the event of an unfavorable judgment by jury or judge. If this were not the case, a large proportion of unsuccessful civil actions would be followed by suits for malicious prosecution, and there would be a piling of litigation on litigation without end.

*Boothby Realty Co. v. Haygood*, 114 So. 2d 555, 559 (1959). The burden of proof is upon the plaintiff to prove each element of the action. *Alabama Power Co. v. Neighbors*, 402 So. 2d 958, 962 (Ala. 1981).

a. Judicial Proceeding Initiated by the Defendant

Defendant asserts that he cannot be liable for malicious prosecution because he did not make the decision to charge plaintiff with reckless driving. (*See* Def.'s Br. at 10-11.) Specifically, defendant contends:

> In the instant case, the evidence is undisputed that the decision to charge Mr. Wood with Reckless Driving was made by Assistant District Attorney Brian Jones. Something more must be shown than that the Defendant provided information which set the machinery of the law in motion.... In order for Trooper Kesler to be held liable for malicious prosecution the Plaintiff would have to show that Defendant Kesler induced Assistant District Attorney Brian Jones to prosecute Mr. Wood for

> Reckless Driving by fraud, subornation, suppression of testimony or other misconduct.

(Def.'s Br. at 10.) The court disagrees with defendant's assertions. First, Alabama law recognizes that a police officer may be held liable under a malicious prosecution claim. *C.f. Nesmith v. Alford*, 318 F.2d 110, 121 (5th Cir. 1963) (in an action brought in the Middle District of Alabama against police commissioner, police chief, and police officers, the court concluded that this element of the malicious prosecution claim was sufficiently established where the "criminal proceeding was instituted in the [municipal court] and carried forward in the Circuit Court"), *Hawkins v. City of Greenville*, 101 F. Supp. 2d 1356, 1362-63 (M.D. Ala. 2000) (claims against police officers for malicious prosecution, where defendant officers allegedly entered plaintiff's home without a warrant or consent, could not be resolved on a motion to dismiss); *Franklin v. City of Huntsville*, 670 So. 2d 848, 853 (Ala. 1995) ("[The defendant officer] argues that he cannot be held liable for false imprisonment or malicious prosecution, because, he says, he had probable cause to arrest [plaintiff] for disorderly conduct. Because we have concluded that disputed issues of fact exist relating to probable cause to arrest for disorderly conduct and failure to obey the police officer's order . . ., the summary judgment entered in favor of [the defendant officer] is due to be reversed.") Second, defendant cites *Neighbors*, 402 So. 2d 958, to support his contention that the judicial proceeding was not instigated by defendant. However, in *Neighbors*, the court discussed the liability of an informant in an action for malicious prosecution under an indictment returned by the grand jury:

> The general rule has been declared . . . that, where a person gives information to the state's prosecuting

> officer charged by law with the duty of enforcing the criminal law, or the investigation and prosecution of probably committed crime, and that information tends to connect another with the commission of crime or the violation of the criminal law, and the informant states all the material facts bearing thereon within his knowledge, and leaves that officer to a discharge of his official duty and the exercise of his own judgment and responsibility, . . . and the officer thereafter brings the matter to the attention of the grand jury for their investigation of the facts upon probable cause in the premises, without more, the informant is not liable in an action for malicious prosecution under an indictment returned by that grand jury. *Id.* at 962 64.

The court further stated:

> [P]laintiff must show that defendant was the proximate and efficient cause of the proceeding[.] While a defendant in an action for malicious prosecution is sufficiently a prosecutor to sustain an action against him, if the prosecution to which the plaintiff is subjected is instituted by the state's attorney at the defendant's insistence and request, something more is required than that the defendant be shown to have given information which set the machinery of the law in motion.... A defendant has not 'caused a prosecution' in the sense that renders him liable when he acts only in subordination to the prosecuting attorney and under the latter's directions; nor when he states the bare facts as to the plaintiff's conduct to such attorney, leaving him to judge of the propriety of proceeding with the

> charge, where the attorney does not act in any way under the direction of the informant or the influence of the information thus received. The cases are in accord in holding that to sustain an action for malicious prosecution, where the proceeding complained of was begun by another, it must affirmatively appear as a part of the plaintiff's case that the defendant was the proximate and efficient cause of such proceeding.
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> . . .
>
> Giving information of a crime to officers, or a request that the officers investigate a crime is not aiding or abetting or instigating a prosecution, **unless such information was a misrepresentation of the facts in order to induce action, or there was a suppression of known material facts.**

*Id.* at 963-64 (citations and quotations omitted, emphasis added). This case is inapposite.[12] Here, defendant was not

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[12] Neither is the court persuaded by the other cases to which defendant cites. In *Hovey v. Slawson*, 598 So. 2d 842 (Ala. 1992), the court concluded that plaintiff could not sustain a malicious prosecution action against a corporation and its president for swearing out a warrant for his arrest for receiving stolen property. *Id.* at 843. In the cited portion of *Nat. Sec. Fire & Cas. Co. v. Bowen*, 447 So. 2d 133 (Ala. 1983), the court addressed the effect of a finding of an indictment by a grand jury on the element of probable cause in a malicious prosecution claim. *Id.* at 140. Finally, *Eubanks v. Gerwin*, 40 F.3d 1157, 1160-61 (11th Cir. 1994), involved a situation in which it was "clear that none of the defendants were responsible for the decision to prosecute, and that none of them improperly influenced the decision to prosecute," because they "fully apprise[d] the State Attorney of all relevant information known to them, including that which weighed for and against [plaintiff's] guilt," and they "concluded what they started to do in this case, i.e. they performed their duties as police officers, by acting on a seemingly reliable tip from a previously reliable informant in making an investigatory stop of a suspect, by then arresting that suspect upon the

merely an informant testifying before a grand jury or any other public official. In fact, defendant, himself, is a public official charged with enforcing the laws of the state. Defendant issued the citation for reckless driving to plaintiff. Further, plaintiff has alleged that defendant misrepresented the facts. If the jury believes plaintiff's version of the facts, plaintiff can show that defendant initiated the criminal proceeding by falsely arresting him in the Limestone County Courthouse on July 8, 1998, by giving false information to the district attorney, and by falsely attesting to facts for reckless driving under the UTC before the magistrate judge.

b. Lack of Probable Cause

As to the second element, probable cause is defined as "a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged." *Montgomery*, 732 So. 2d at 309 (citing *Parisian Co. v. Williams*, 83 So. 122, 127 (Ala. 1919)). "The question is not whether the malicious prosecution plaintiff was guilty of the thing charged, but whether the malicious prosecution defendant acted in good faith on the appearance of things." *Id.* (quoting *Birwood Paper Co. v. Damsky*, 229 So. 2d 514, 521 (1969)) (quotations omitted) (emphasis in original). Where a claim of malicious prosecution originates from a prior criminal case, malicious or evil intent may be implied from

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discovery of cocaine in the automobile, conducting a subsequent continued investigation, and turning over all relevant information about the matter to the State Attorney." The court then concluded that the officers were entitled to summary judgment in connection with the plaintiff's malicious prosecution claim pursuant to Section 1983. *Id.*

circumstances in which a prosecution was begun for any purpose other than a bona fide purpose to bring an accused to punishment as a violator of the criminal law. *Id.* (citing *Bowen*, 447 So. 2d at 140; *Damsky*, 229 So. 2d 514).

For the same reasons that the court found that disputed issues of fact exist regarding whether defendant had arguable probable cause to arrest plaintiff for reckless driving under Section 1983, there are disputed issues of fact as to whether defendant had probable cause to make the arrest as to plaintiff's claim of malicious prosecution. *See Franklin*, 670 So. 2d at 853 (Summary judgment entered in favor of the defendant officer due to be reversed where there were disputed issues of fact relating to probable cause to arrest for disorderly conduct and failure to obey officer's orders). This unresolved dispute presents a question for the jury. *See Delchamps*, 738 So. 2d at 832 (When disputed facts are presented in malicious prosecution action, the issues of the existence of probable cause for prosecution and the absence of malice are not questions of law for the trial court, but rather present questions for the fact-finder.)

c. Malice

In an action for malicious prosecution, malice "implies the intentional doing of a wrongful act to the injury of another." *Nesmith*, 318 F.2d at 123 (citing *Huffstutler v. Edge*, 47 So. 2d 197, 199 (Ala. 1950)).

> Malice may be defined to be any "indirect motive of wrong." Any motive, not a bona fide purpose, or, not associated with a bona fide purpose, of bringing a person to punishment as a violator of criminal law, is a malicious motive on the part of the person who acts under its influence.

*Id.* (citing *Jordan v. Alabama G.S.R.R.*, 8 So. 191,192 (Ala. 1886)). Further, "[i]t is well established that for purposes of a malicious-prosecution claim, the element of malice may be inferred from the lack of probable cause." *Ex parte Tuscaloosa County*, 2000 WL 1273686, at *6 (Ala. Sept. 8, 2000) (citing *Delchamps*, 738 So.2d at 833; *McLeod v. McLeod*, 75 Ala. 483, 486 (1883)). The mere fact that a malicious prosecution plaintiff was acquitted in prior action does not establish a want of probable cause. *Delchamps*, 738 So. 2d at 832. Where no other reasonable explanation exists for the conduct of a malicious prosecution defendant, malice may be inferred; however, an inference of malice from the lack of probable cause may be rebutted by evidence showing that the defendant acted in good faith. *Id.* at 833.

Plaintiff asserts that he "can show malice on the part of Kesler through his smart-aleck conduct at the time the original speeding and log book tickets were issue[d], by knowingly issuing a ticket without probable cause, and the comments [that Kesler] made to Wood while taking him to jail." (Pl.'s Br. at 14.) If a jury believes plaintiff's version of the facts, then defendant arrested plaintiff for reckless driving when he knew plaintiff was not guilty of such conduct, and such arrest was made in bad faith and "in retaliation for [plaintiff's insistence on asserting] his Constitution[al] right to a trial on the speeding ticket and log book tickets and refusing a plea bargain." (Pl.'s Br. at 13; *see also* Pl.'s Br. at 11-12, 14.) Thus, the court is of the opinion that there are disputed issues of fact as to whether defendant acted with malice when he arrested plaintiff for reckless driving, and such issues present a question for the jury. *See Delchamps*, 738 So. 2d at 832.

d. Termination of the Proceedings in Favor of the Plaintiff

It is undisputed that the criminal prosecution of plaintiff for reckless driving resulted in a finding of not guilty.

e. Damages

Plaintiff contends that he can establish "both economic loss and mental anguish over this wrongful prosecution." Defendant does not dispute this assertion.

*2. False Arrest*

"False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." Ala. Code, Section 6-5-170. "Thus, a wrongful or false arrest will also support a claim for false imprisonment." *Rose*, 952 F. Supp. at 766 (quoting *Upshaw v. McArdle*, 650 So.2d 875, 878 (Ala.1994)) (quotation marks omitted).

> In order to constitute a case of false imprisonment it is essential that there be some direct restraint of the person; but to constitute 'imprisonment,' in the sense in which the word is here used, it is not necessary that there should be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. So, if an officer tells a person that he is under arrest, and he thereupon submits himself to the officer, going with him and obeying his orders, such person is deprived

> of his liberty, and if the act of the officer is unlawful this is a false imprisonment.

*Daniels v. Milstead*, 128 So. 447, 448 (Ala. 1930) (citations and quotations omitted).

In making an arrest, "the only requisite is that at the time the arrest is made, the police officer have probable cause." *Rose*, 952 F. Supp. at 766 (citing *Carrutk v. Barker*, 454 So. 2d 539, 540 (Ala. 1984)). An arrest without probable cause is unlawful. Jones, 174 F.3d at 1283. "[P]robable cause exists where facts and circumstances, of which the officer has reasonably trustworthy information, are sufficient to lead a reasonable person to believe that an offense has, in fact, been committed." *Rose*, 952 F. Supp. at 766 (quotations and citations omitted).

Plaintiff contends that there was no probable cause to support a charge of reckless driving, and, therefore, his arrest and prosecution were improper. Defendant asserts that "[t]here is no dispute . . . that Mr. Wood refused to sign the ticket for Reckless Driving and that he was aware that if he refused to sign he would be taken to jail. The Plaintiff should not be allowed to create a cause of action against Trooper Kesler by his own actions." (Def.'s Br. at 13.) Further, defendant contends that "[t]he custodial arrest of the Plaintiff was lawful pursuant to Section 32-1-4(a)" of the Alabama Code. (Def.'s Br. at 13.) This statute provides:

> Whenever any person is arrested for a violation of any provisions of this title punishable as a misdemeanor, the arresting officer shall, unless otherwise provided in this section, take the name and address of such person and the license number of his motor vehicle and issue a summons or

> otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, and such person shall, if he so desire, have a right to an immediate hearing or a hearing within 24 hours at a convenient hour and such hearing to be before a magistrate within the county or city where such offense was committed. Such officer shall thereupon and upon the giving by such person of a sufficient written bond, approved by the arresting officer, to appear at such time and place, forthwith release him from custody.
>
> Any person refusing to give such bond to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate.
>
> Any person who willfully violates his written bond to appear, given in accordance with this section, shall be guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested.

Ala. Code Section 32-1-4(a).

As noted above, an arrest made without probable cause is unlawful, and an unlawful or false arrest will also support a claim for false imprisonment. *Jones*, 174 F.3d at 1283; *Rose*, 952 F.Supp. at 766. In analyzing plaintiff's Section 1983 claim, the court concludes that a question of fact exists as to whether defendant had arguable probable cause to arrest plaintiff for reckless driving. Arguable probable cause is a lesser standard for defendant to meet than probable cause.[13] Thus, as to plaintiff's claim for false

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[13] *See, supra*, n. 10.

arrest, the court concludes that, for the same reasons given as to plaintiff's Section 1983 claim, a question of fact exists as to whether defendant had probable cause to arrest plaintiff for reckless driving.

*3. Discretionary Function Immunity*

Defendant asserts that he is entitled to discretionary function immunity because "[t]he act of making an arrest is a discretionary function," and "[e]ven if this Court should find Trooper Kesler initiated the criminal charge, Trooper Kesler would be entitled to immunity from suit since that act would be a discretionary function." (Def.'s Br. at 14.) Defendant further asserts that "[t]he evidence . . . supports a finding that probable cause existed for the arrest of Mr. Wood for Reckless Driving and there is no evidence that Trooper Kesler acted maliciously or in bad faith." (*Id.*)

State law officers enjoy a discretionary immunity from suit for discretionary acts taken in the officer's official capacity under Article 1, Section 14 of the Alabama Constitution and under Section 6-5-338 of the Alabama Code. *See Williams v. Crook*, 741 So. 2d 1074, 1076 (Ala. 1999). Alabama Code Section 6-5-338 provides, in pertinent part:

> (a) Every peace officer, except constables, who is employed or appointed pursuant to the Constitution or statutes of this state, whether appointed or employed as such peace officer by the state or a county or municipality thereof, . . . created pursuant to the Constitution or laws of this state and authorized by the Constitution or laws to appoint or employ police officers or other peace officers, and whose duties prescribed by law, or by the lawful terms of their employment or appointment, include

> the enforcement of, or the investigation and reporting of violations of, the criminal laws of this state, and who is empowered by the laws of this state to execute warrants, to arrest and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties. (b) This section is intended to extend immunity only to peace officers and governmental units or agencies authorized to appoint peace officers.

Alabama law defines "discretionary acts" as "those acts to which there is no hard and fast rule as to course of conduct that one must or must not take and those requiring exercise in judgment and choice and involving what is just and proper under the circumstances." *Sheth v. Webster*, 145 F.3d 1231, 1239 (11th Cir. 1998); *Montgomery*, 732 So. 2d at 311. Discretionary acts require "constant decision making and judgment." *Mortgomery*, So. 2d at 310. In *Ex parte Cranman*, 2000 WL 1728367, at ** 1112 (Ala. Nov. 22, 2000), the Alabama Supreme restated the rule governing state-agent immunity. The court stated:

> A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's
>
> (1) formulating plans, policies, or designs; or

(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:

(a) making administrative adjudications;

(b) allocating resources;

(c) negotiating contracts;

(d) hiring, firing, transferring, assigning, or supervising personnel; or

(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or

(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or

(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity

(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or

(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his

> or her authority, or under a mistaken interpretation of the law.

*Cranman*, 2000 WL 1728367, at ** 11-12. The court further noted: "The Legislature, should it see fit to do so, can create a mechanism for providing State employees with liability insurance or it can propose a constitutional amendment that would authorize statutory procedures to make the State amenable to lawsuits for the torts of its agents while protecting State employees from lawsuits." *Id.* at * 12. Thus, in order to defeat a state agent's defense of discretionary function immunity, plaintiff must prove that the defendant's conduct was willful, malicious, fraudulent, in bad faith, beyond his authority, or under mistaken interpretation of the law. *See Ex parte Tuscaloosa County*, 2000 WL 1728367, at *1 1-12. Plaintiff asserts:

> [C]onsidering the evidence in the light most favorable to him, coupled with favorable inferences, . . . the reckless driving citation was executed with willful, malicious conduct or engaged in bad faith. The fraudulent issuance of a reckless driving offense when there is a complete absence of probable cause should be sufficient evidence of bad faith to submit the case to a jury.

(Pl.'s Br. at 15-16.)

Plaintiff asserts that (1) defendant failed to respond to his discovery request for the trial on the speeding and log book violations; (2) neither plaintiff nor Martin was cited for reckless driving during the initial stop; rather, defendant issued the citation only to plaintiff in the Limestone County Courthouse over three months after defendant initially stopped plaintiff and Martin; (3) plaintiff was not cited for

reckless driving until he refused to enter into a plea agreement for the speeding and log book violations; (4) Martin, who was following plaintiff, and who, according to defendant's testimony, was driving more egregiously, was not issued a ticket for reckless driving; (5) there is nothing in defendant's testimony to support a finding of probable cause for the reckless driving arrest; and (6) defendant questioned plaintiff on the ride from the courthouse to the jail as to why plaintiff would not accept the plea agreement and why plaintiff subpoenaed his records. (Pl.'s Br. at 6-9; *see also* PX A at 1-2; PX B at 1-2; PX D at 21; PX E at IS9-6l; PX G at 69-78; PX H; DX A at Exs. 11-14.) The court is of the opinion that summary judgment is a not appropriate as to defendant's assertion of discretionary function immunity because there is an issue of fact as to whether defendant acted maliciously, willfully, or in bad faith in arresting plaintiff for reckless driving.

## III. CONCLUSION

For the foregoing reasons, the court is of the opinion that defendant's Motion for Summary Judgment is due to be granted in part and denied in part. Defendant's Motion is due to be granted as to plaintiff's claims under 42 U.S.C. Section 1985 and as to all claims against defendant in his official capacity. Defendant's Motion is due to be denied as to plaintiff's federal claim under 42 U.S.C. Section 1983 and as to plaintiff's state law claims of malicious prosecution and false arrest. An order in accordance with this Memorandum Opinion will be entered contemporaneously herewith.

DONE this 19th day of September, 2001.

SHARON LOVELACE BLACKBURN

United States District Judge

Appendix C - Opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing and en banc consideration Dated and Decided April 28, 2003

**ON PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC.***

Before: Carnes, Hull and Alarcon*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

Frank M. Hull
United States Circuit Judge

Dated: April 28, 2003

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation